Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

TIMOTHY C. TEMPLETON,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard of review for a district court's decision not to remand under sentence six of 42 U.S.C. § 405(g) should be *de novo* or abuse of discretion.

2. When a treating physician, whose restrictions have been given credit by the administrative law judge, gives a new functional capacity assessment, after the physician's return from military service in a foreign country and after a decision by an administrative law judge in a Social Security disability benefits case, and the new assessment disqualifies the claimant from the range of available jobs identified by the vocational expert in the administrative proceedings, should the district court remand to the administrative process for reconsideration under sentence six of 42 U.S.C. § 405(g).

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, Timothy C. Templeton, is an individual citizen of the United States. Mr. Templeton brought this suit, after exhausting the administrative process, seeking an award of social security disability benefits under Titles II and XVI of the Social Security Act. Mr. Templeton was the Petitioner in the administrative proceedings, the Plaintiff in the District Court, and the Appellant in the Sixth Circuit Court of Appeals. Mr. Templeton is an individual and not a corporation, and thus has no corporate disclosure to make under S. Ct. R. 29.6.

Respondents

Respondent Commissioner of Social Security is an officer of the United States of America. Respondent was the Commissioner of the administrative agency before which the administrative proceedings in this matter were conducted, the Defendant in the District Court, and the Appellee in the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit(App. A at 1a) is not reported. *See* 2007 WL 413906 (6th Cir., February 8, 2007). The Trial Court's order denying the Plaintiff's Motion for Summary Judgment (App. B at 13a) is not reported. The District Court order denying the Plaintiff's Motion to Alter or Amend (App. D at 21a) is not reported.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered February 8, 2007. (App. A at 1a.) This petition is filed within ninety days of the entry of that judgment/opinion. S. Ct. R. 13(1).

The District Court had original jurisdiction in this matter under 28 U.S.C. § 1331, 42 U.S.C. § 405(g), and 42 U.S.C. § 1383(c)(3).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

United States Code, Title 42, Section 405(g), which provides in part (the first and sixth sentences):

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

* * * *

The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based.

STATEMENT OF THE CASE

The Plaintiff filed this action on July 20, 2005, seeking review of an unfavorable decision by the Commissioner of Social Security regarding social security disability benefits. (App. A at 3a.)

The District Court had original jurisdiction in this matter under 28 U.S.C. § 1331, 42 U.S.C. § 405(g), and 42 U.S.C. § 1383(c)(3).

The parties filed cross motions for summary judgment. (App. B at 13a.) The District Court denied the Mr. Templeton's Motion for Summary Judgment and granted the Commissioner's Motion for Summary Judgment. (App. B at 18a; App. C at 19a.) The District Court denied Mr. Templeton's motion to alter or amend the order granting the Commissioner summary judgment. (App. D at 23a.)

Mr. Templeton timely appealed to the United States Court of Appeals for the Sixth Circuit. (App. A at 1a-3a.) The Sixth Circuit affirmed the decision of the District Court. (App. A at 11a-12a.)

In both the District Court and the Sixth Circuit, Mr. Templeton argued that the District Court should have remanded his case to the Social Security Administration for consideration of newly produced evidence, under sentence six of 42 U.S.C. § 405(g). (*See* App. A at 10a; App. B at 16a.)

Plaintiff's treating neurologist, John Raff, M.D., provided extensive medical treatment for Mr. Templeton in 2004, and Dr. Raff's records were included in the materials reviewed by the administrative law judge. (*See* App. A at 4a-6a.) Dr. Raff entered a period of active military service in 2004, and

served in Afghanistan from May 2004 to May 2005. (App. A at 6a; App. E at 25a-26a.) Upon his return from Afghanistan, Dr. Raff completed a new, more restrictive functional capacity assessment; Mr. Templeton submitted this new assessment to the Appeals Counsel and the District Court. (App. E at 24a-26a.)

The District Court and the Sixth Circuit both refused to consider the medical report of Dr. Raff from May 2005. (App. A at 10a-12a; App. B at 16a-18a; App. D at 21a-22a.)

Mr. Templeton now seek review by this Court as to the standard of review regarding the District Court's denial of a remand under sentence six of 42 U.S.C. § 405(g) and the proper standard for applying the materiality requirement of sentence six of 42 U.S.C. § 405(g).

REASONS FOR GRANTING THE PETITION

A conflict exists between the decisions of certain United States Courts of Appeal regarding the standard of review for a district court's denial of a "sentence six" remand under 42 U.S.C. 405(g).

This petition requests this Court to accept review of this case in order to resolve an important inter-circuit split and intra-circuit disagreement or uncertainty regarding the standard of review for judicial remand of cases to the administrative process under sentence six of 42 U.S.C. § 405(g).

The Sixth Circuit noted in its opinion in this matter that an intra-circuit uncertainty exists in the Sixth Circuit regarding the appropriate standard of review of a decision to remand or not remand a case to the administrative process from the

district court. (App. A at 12a [n. 3].) Two different panels within the 6th Circuit have noted the differing standards of review, abuse of discretion or *de novo*. *See Perkins v. Apfel*, 14 Fed. Appx. 593, 598-599 (6th Cir. 2001) (abuse of discretion); *Cranfield v. Comm'r, Soc. Sec.*, 79 Fed. Appx. 852, 857, 858-859 (6th Cir. 2003).

In *Cranfield*, the Sixth Circuit stated:

> There is a split in the circuits with regard to the second issue in this appeal (whether the post-hearing medical evidence was material and whether Ms. Cranfield had good cause to submit it after the ALJ's decision). *See Thomas v. Sullivan*, 928 F.2d 255, 260 n.1 (8th Cir.1991)(identifying conflict between circuits, but applying an abuse of discretion standard). This Circuit has not established whether such an issue is subject to *de novo* review or reviewed for an abuse of discretion. Since Ms. Cranfield's argument would fail under either standard of review, the matter need not be resolved here.

79 Fed. Appx. at 857.

An intercircuit split exists on this point of law: whether a refusal to order a "sentence six" remand to the administrative process will be judged by a *de novo* standard or an abuse of discretion standard. *See Thomas v. Sullivan*, 928 F.2d 255, 260 n.6 (8th Cir. 1991); *Geigle v. Sullivan*, 961 F.2d 1395, 1397 (8th Cir. 1992); *Sample v. Shalala*, 999 F.2d 1138, 1144 (7th Cir. 1993); *and*, *Mayes v. Massanari*, 276 F.3d 453, 461-462 (9th Cir. 2003).

This Court should accept review of this matter in order to resolve that split.

The Sixth Circuit indicated that the choice of the standard of review would not matter in this case. (App. A at 12a n. 3; *see also* App. A at 10a-11a.) The conclusion that the choice of standard of review should not be upheld, however, because the Sixth Circuit also noted that the May 2005 "assessement [by Dr. Raff] reflected greater exertional restrictions that would not be consistent with light work." (App. A at 11a.)

The District Court and the Sixth Circuit both indicated that consideration of the additional evidence likely would not matter to the administrative law judge, because the administrative law judge would want an explanation from Dr. Raff regarding the more physically restrictive opinion given by Dr. Raff in his May 2005 evaluation than in his previous evaluation. (App. A at 11a; App. B at 16a-17a; App. C at 21a-22a.)

The Petitioner respectfully asserts that the courts below speculated about what the administrative law judge would or would not have done; the decision about how to view the evidence that indisputably placed restrictions upon Mr. Templeton that would have disallowed him from performing the jobs that the administrative law judge found him able to perform (and available), the only jobs the vocational expert identified in her testimony as matching Mr. Templeton's restrictions and being available, (*see* App. A at 6a-7a, 11a; App. B at 17a-18a; App. D at 22a), should be made by the administrative law judge pursuant to a remand under 42 U.S.C. § 405(g) and the decision to remand should be reviewed under a *de novo* standard. The administrative law judge had previously credited the opinion of Dr. Raff regarding Mr. Templeton's physical limitations, and very

reasonably could have credited Dr. Raff's May 2005 evaluation (or at least might not have discounted it in the manner the courts below seemed to believe would have been done).

CONCLUSION

For the reasons set forth in this petition, a Writ of Certiorari should be granted and this case brought before this Court on its merits. If a Writ of Certiorari is granted, then Petitioner prays that the judgment of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-5545

[Filed February 8, 2007]

TIMOTHY C. TEMPLETON, Plaintiff-Appellant,	)
v.	)
COMMISSIONER OF SOCIAL SECURITY, Defendant-Appellee.	)

On Appeal from the United States District Court for the Eastern District of Tennessee

Before: GUY, SUHRHEINRICH, and GRIFFIN, Circuit Judges.

PER CURIAM. Plaintiff Timothy C. Templeton appeals from the district court's order affirming the denial of his application for social security disability benefits. First, seeking reversal, Templeton contends that there was not substantial evidence to support the ALJ's conclusion that he retained the capacity to perform unskilled light work that

allowed for frequent postural changes. Second, Templeton argues that the district court erred by refusing to remand his claim for consideration of new evidence concerning his residual functional capacity. For the reasons that follow, we affirm in all respects.

I.

Templeton applied for disability insurance benefits alleging that his disability began on May 30, 2003, after he injured his back at work. Templeton, who completed high school, had past relevant work experience as a shipper and a crane operator. His prior relevant work required heavy exertion, which it is undisputed he could no longer perform. Plaintiff maintained that he was disabled due to a herniated disc at L5-S1 and constant pain in his lower back radiating down both legs. His application was denied initially and on reconsideration, and a hearing was held before an ALJ on February 3, 2005.

In a written decision issued April 11, 2005, the ALJ found that plaintiff had demonstrated a severe impairment that was expected to last more than 12 months which would preclude him from performing his past relevant work. The ALJ also concluded, however, that Templeton retained the capacity to perform simple, unskilled, light work that allowed for frequent postural changes. Relying on the vocational expert's testimony that a significant number of such jobs existed in the national economy, the ALJ concluded that plaintiff was not disabled under the Social Security Act. Plaintiff submitted additional evidence with his request for review by the Appeals Council. The Appeals Council denied review on June 30, 2005, and the ALJ's decision became the final agency action.

Plaintiff brought this action seeking judicial review of the denial of benefits, and cross-motions for summary judgment were filed. The district court granted summary judgment to the Commissioner on March 9, 2006, finding that substantial evidence supported the ALJ's decision and denying the request for remand under sentence six of 42 U.S.C. § 405(g). Plaintiff filed a motion to alter or amend judgment, which was also denied, and this appeal followed.

II.

A five-step sequential process is used to determine whether a claimant is disabled within the meaning of the Social Security Act. *See* 20 C.F.R. § 404.1520; *Warner v. Comm'r of Soc. Sec*, 375 F.3d 387, 390 (6th Cir. 2004); *Foster v. Halter*, 279 F.3d 348, 353 (6th Cir. 2001); *Heston v. Comm'r of Soc. Sec.*, 245 F.3d 528, 535 (6th Cir. 2001).[1]

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[1] The claimant must first demonstrate that he is not engaged in any "substantial gainful activity" at the time he seeks disability benefits, and then that he suffers from a "severe impairment" that "significantly limits... physical or mental ability to do basic work activities." 20 C.F.R. § 404.1520(b) and (c) and § 416.920(c). Third, if the claimant's severe impairment is expected to last for at least 12 months and the impairment "meets or equals a listed impairment," he is presumed to be disabled. 20 C.F.R. § 404.1520(d) and § 416.920(d). Fourth, if the impairment does not meet or equal a listed impairment and does not prevent the claimant from doing past relevant work, he is not disabled. 20 C.F.R. § 404.1520(e). If he cannot perform past relevant work, other factors are considered at the fifth and final step including age, education, work experience, and residual functional capacity, to determine whether the claimant can make an adjustment to other work. 20 C.F.R. § 404.1520(f) and § 404.1545. If he can, he is not disabled under the Social Security Act.

The claimant bears the burden of proof on steps one through four, and then the burden shifts to the Commissioner to establish that there are a significant number of jobs in the national economy that the claimant can perform. *Warner*, 375 F.3d at 390. In this case, the ALJ acting for the Commissioner found in plaintiff's favor on each of the first four steps, but concluded at the fifth and final step that there was work Templeton could perform and denied his application for benefits.

"This court must affirm the Commissioner's conclusions absent a determination that the Commissioner has failed to apply the correct legal standards or has made findings of fact unsupported by substantial evidence in the record." *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997); *see also* 42 U.S.C. § 405(g). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)(citation omitted). In reviewing the Commissioner's conclusions, we may not resolve conflicts in the evidence or decide questions of credibility. *Gaffney v. Bowen*, 825 F.2d 98, 100 (6th Cir. 1987). Even if substantial evidence would have supported the opposite conclusion, the Commissioner's findings must be affirmed if supported by substantial evidence. *Key v. Callahan*, 109 F.3d 270, 273 (6th Cir. 1997).

A. Evidence

Plaintiff was diagnosed and treated by neurosurgeon John Raff, M.D., for a herniated disc at L5-S1 and pain in the low back and legs between May 2003 and January 2004. Surgery was rejected as a treatment option given the risk of a poor outcome due in part to the fact he weighed over 300 pounds.

Plaintiff received physical therapy and underwent several spinal injections, but neither resolved his complaints. The doctor who administered the injections, Timothy Smyth, M.D., of Pain Medicine Associates, diagnosed plaintiff as having lumbar spondylosis without myelopathy, mild lumbar degenerative disc disease, and mild lumbar herniated nucleus pulposus. Plaintiff's primary care doctors, first Dr. John Ille and later Dr. Mark Dalle-Ave, also treated plaintiff for hypertension, low back pain, neuropathy, depression, anxiety, stress, and reflux disease.

Dr. Raff referred plaintiff to occupational therapist Jeff Snodgrass for a functional capacity evaluation, which was conducted in December 2003. After examining plaintiff, the therapist concluded that plaintiff was able to stand, walk, bend, and stoop occasionally, and needed to be able to alternate between positions as his symptoms required. Plaintiff could also climb stairs occasionally — but not ladders — and could not crouch, squat, twist, or perform low level work. Snodgrass found that plaintiff was limited to sedentary physical demands for lifting (up to 10 pounds occasionally); light physical demands for carrying, pushing, and pulling (up to 20 pounds occasionally); and should initially return to work for only three to four hours per day. This evaluation concluded that plaintiff was capable of sedentary to light work.

In a letter dated January 13, 2004, Dr. Raff opined that plaintiff had reached "maximum medical improvement and [was] not likely to become appreciably better or worse in the foreseeable future." With respect to his functional capacity, Dr. Raff concluded as follows:

> Based on his history and physical examination, imaging, and functional capacities evaluation, I would

> consider Mr. Templeton in a sedentary/light capacity of work which would allow freedom in the work space to sit or stand at will, move around the work space, and not be mandated to maintain any static postures longer than he is comfortable. It is likely he will require to be in/out [of] a seated or walking position about every 30 minutes. His work should not require lifting greater than 20 lbs. occasionally, 10 lbs. frequently, or 5 lbs. continuously, and lifting should be restricted to between the hips and shoulders. He should not do any forward extended lifting, i.e., non-ergonomic positions.

Dr. Raff released plaintiff from his care at that time and recommended that he continue pain management through his primary care doctor or a pain management specialist. Dr. Raff did not examine or treat plaintiff after that, and was on active military duty in Afghanistan between May 2004 and May 2005.

The ALJ chose to credit Dr. Raff's opinion concerning the extent of plaintiff's physical limitations over the conclusions of two non-examining agency reviewers who concluded plaintiff's exertional capacity was limited to sedentary work. The ALJ also discounted the opinion of Norman Hankins, Ed.D., a psychologist who did a vocational evaluation of plaintiff, that there were no jobs that the plaintiff could perform on a full-time basis. Although Hankins conducted tests of the plaintiff's intellectual capacities, his evaluation of plaintiff's physical limitations was based on the limitations identified by Dr. Raff.

Plaintiff testified during the administrative hearing in February 2004 that he experienced pain almost all of the time, that the pain would radiate into one or both legs, and that he

usually could not sit or stand for more than 15 to 20 minutes. He explained that when the pain is worse, which was one to three days a week, he could hardly get out of bed. At the time of the hearing, plaintiff was taking Neurontin and Lortab for pain. Plaintiff testified that he took 10 mg. of Lortab three times per day, and that it sometimes made him drowsy or "sort of sleepy."

The ALJ posed several hypothetical questions to vocational expert Cathy Sanders. Specifically, Sanders was asked to assume that an individual with plaintiff's age, education, and work experience had the capacity to do simple, unskilled light work activity that involved lifting up to 20 pounds occasionally and 10 pounds frequently, and that allowed for frequent postural changes. Sanders testified that a person with those vocational characteristics and functional capacities could work as a gate guard, parking lot attendant, information clerk, or ticket clerk. She added that 1,100 such jobs existed in the regional economy and 30,000 in the national economy.

When the ALJ asked Sanders to include as an additional limitation that pain would frequently interfere with the individual's ability to concentrate and persist at work tasks, she indicated that this limitation would eliminate the jobs she had identified. On cross-examination, Sanders agreed that the side effects of pain medication could also interfere with the ability to perform those jobs. Finally, when asked about sedentary work, Sanders responded that there were no unskilled sedentary jobs that would allow for frequent postural changes.

B. Analysis

The ALJ credited Dr. Raff's assessment of the plaintiff's physical limitations, discounted plaintiff's testimony concerning the extent of his pain and the side effects of his medication, and concluded that plaintiff could do unskilled light work if it allowed for frequent postural changes and that a significant number of such jobs existed in the national economy. The regulations define light work as involving lifting no more than 20 pounds at a time with frequent lifting or carrying of up to 10 pounds, while sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting and carrying of small objects. A job will also be light work if it requires a good deal of walking or standing, or involves sitting most of the time with some pushing and pulling. 20 C.F.R. § 404.1567(b). Plaintiff contends on appeal that substantial evidence does not support the ALJ's determination that he was capable of performing light work that allowed for frequent postural changes.

First, plaintiff argues that the ALJ improperly disregarded the vocational expert's testimony that even those jobs would be eliminated if pain frequently interfered with his ability to concentrate and persist at work tasks or if the side effects of medication interfered with his ability to do those jobs. The ALJ did not reject the vocational expert's testimony, but simply found that neither plaintiff's pain nor the side effects of medication were of such severity that it would interfere with his ability to perform the identified jobs. We must affirm this conclusion unless it is not supported by or consistent with the evidence. *Cline v. Comm'r of Soc. Sec,* 96 F.3d 146 (6th Cir. 1996). The ALJ credited the treating physicians' assessments and diagnoses, evaluated the extent to which the severity of the plaintiff's pain could reasonably be accepted as consistent with the medical evidence, and found plaintiff's

testimony about the extent of his pain was not fully credible. "[A]n ALJ's findings based on the credibility of the applicant are to be accorded great weight and deference, particularly since an ALJ is charged with the duty of observing a witness's demeanor and credibility." *Walters*, 127 F.3d at 531. Nevertheless, an ALJ's assessment of a claimant's credibility must be supported by substantial evidence. *Id.* We find that there is substantial evidence in the record to support the ALJ's adverse credibility finding and conclusions that neither plaintiff's pain nor the side effects of pain medication precluded him from performing the identified jobs.

Next, it is argued that the ALJ mischaracterized the physical limitations identified by Dr. Raff as allowing light work. On the contrary, the ALJ's finding that the restrictions were consistent with a range of light work is supported by substantial evidence. There was no limitation imposed on the amount of time plaintiff could stand or sit in a work day, only the requirement that the work provide him the freedom to alternate between sitting and standing as needed. Plaintiff seems to argue that because he could not perform a full range of light work, he should have been restricted to sedentary work and found disabled because there are no unskilled sedentary jobs that allow for frequent postural changes. When a claimant's functional abilities exactly meet the definition for a category of work, *i.e.*, light work, the Medical-Vocational Guidelines, or "grids," allow the ALJ to take notice of the number of jobs available in the national economy. *Heston*, 245 F.3d at 537. When, however, the claimant's characteristics do not exactly match the definition of, for example, light work, his residual functional capacity is used as the proper framework to determine whether he is disabled. *Wright v. Massanari*, 321 F.3d 611, 615 (6th Cir. 2003). This is precisely what the ALJ did in this case when he determined the plaintiff's specific limitations and posed a hypothetical to

the vocational expert concerning the number of simple, unskilled light work jobs that would also allow for frequent postural changes.[2]

After de novo review of the administrative record, we find the ALJ's conclusions are supported by substantial evidence and affirm.

III.

In the alternative, plaintiff argues for remand for consideration of evidence that was not before the ALJ, but was submitted to the Appeals Council with the request for review. When the Appeals Council considers new evidence but declines to review the application for disability benefits, that evidence may not be considered as part of the record for purposes of the substantial evidence review. *Foster v. Halter*, 279 F.3d 348, 357 (6th Cir. 2001); *Cline*, 96 F.3d at 148. Remand under sentence six of 42 U.S.C. § 405(g) requires that the evidence be both new and material, and that there was good cause for not presenting it in the prior proceeding. *Foster*, 279 F.3d at 357. Evidence is "new" only if it was not in existence or was not available prior to the ALJ's decision. *Id.* Such evidence is "material" if there is a reasonable probability that the ALJ would have reached a different

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[2] Social Security Rule 83-12 explains that when an individual's residual functional capacity does not coincide with the definitions of any one of the ranges of work, the occupational base is affected and, when that effect is not clear, the ALJ is to consult a vocational resource. If the exertional level falls between two "grids" that would direct opposite conclusions concerning disability, more difficult judgments are involved as to the sufficiency of the remaining occupational base and the assistance of a vocational expert is advised.

decision had the additional evidence been presented. *Id.* A claimant shows "good cause" by demonstrating a reasonable justification for the failure to acquire and present the evidence at the hearing before the ALJ. *Id.*

At issue here is a one-page functional capacity assessment prepared by Dr. Raff in May 2005, after the ALJ's decision finding that plaintiff was not disabled. On that form, Dr. Raff indicated that plaintiff could only lift 10 pounds occasionally and 5 pounds frequently, could only work four hours a day, and would have to be free to alternate between sitting and standing at will. Dr. Raff also noted that he had been out of the country on military duty between May 11, 2004, and May 2, 2005, and confirmed that he was not available to answer interrogatories, act administratively, or clinically attend to plaintiff's care during that time.

To be sure, this assessment reflected greater exertional restrictions that would not be consistent with light work. We agree with the district court that this evidence is not material, however, because Dr. Raff offered no explanation for why his opinion of plaintiff's functional capacity had changed from January 2004. This is particularly significant as Dr. Raff had released plaintiff from his care and was out of the country from May 2004 through May 2005. Without an explanation for the change, it is not likely that the ALJ would have reached a different decision had the additional evidence been presented. The evidence is also not new because plaintiff could have requested a second assessment by Dr. Raff after receiving the letter in January 2004, or after the first denial of his application in March 2004. Plaintiff has not met the

burden of demonstrating that a sentence six remand is warranted.[3]

AFFIRMED.

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[3] While it is not clear whether the district court's decision not to remand should be reviewed *de novo* or for abuse of discretion, we need not resolve the question because we would affirm under either standard. *Compare Perkins v. Apfel*, 14 Fed. App'x 593 (6th Cir. 2001), and *Cranfield v. Comm'r, Soc. Sec,* 79 Fed. App'x 852 (6th Cir. 2003).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

No. 2:05-CV-195

[Filed March 9, 2006]

TIMOTHY CRAIG TEMPLETON	)
	)
v.	)
	)
JO ANNE B. BARNHARDT, Commissioner of Social Security	)
	)

MEMORANDUM OPINION

The plaintiff Timothy Craig Templeton has filed a motion for summary judgment on his complaint to obtain judicial review of the final decision of the defendant Commissioner of Social Security Jo Anne B. Barnhardt denying his application for disability insurance benefits under the Social Security Act. The defendant has also filed a motion for summary judgment.

Mr. Templeton was born in 1961 and was 43 years old at the time of his administrative hearing. [Tr. 190]. He completed high school and has relevant past work experience

as a shipper and crane operator. [Tr. 12]. Mr. Templeton alleges he is disabled as of May 30, 2003, from a herniated disc and constant pain in his lower back. [*Id.*]. Based upon a finding that his severe impairments were not severe enough, the Administrative Law Judge [ALJ] found that Mr. Templeton was not disabled as defined by the Social Security Act. [Tr. 15].

At Mr. Templeton's administrative hearing held on February 3, 2005, the testimony of Mr. Templeton and vocational expert Cathy Sanders was received into evidence. [Tr. 179-95]. Mr. Templeton testified he "made it by" in school. [Tr. 179]. He worked for at least 23 years at a glass plant. [Tr. 180]. Mr. Templeton had various jobs, including packing glass, working on the float line, building crates, and running an overhead crane. [*Id.*]. Mr. Templeton was hurt on the job in May 2003. [Tr. 182]. Aside from his back pain, he also suffers from high blood pressure and depression. [Tr. 187, 189].

Vocational expert Cathy Sanders testified next that Mr. Templeton's past relevant work as a crane operator was heavy and skilled and his work as a shipper was heavy and unskilled. [Tr. 192]. The ALJ then asked her to assume a man of Mr. Templeton's age, education, and work background who was restricted to light work which would require lifting of up to 20 pounds occasionally and 10 pounds frequently. [*Id.*]. Such a person would also need a simple, unskilled job that allowed for frequent postural changes. [*Id.*]. The vocational expert testified such a person could work as a gate guard, parking lot attendant, information clerk, and ticket clerk. [Tr. 193].

The ALJ ruled that Mr. Templeton was not disabled because his musculoskeletal impairments and intellectual

impairment were not severe enough for a finding of disability. [Tr. 15]. The ALJ then found Mr. Templeton retained the residual functional capacity [RFC] to perform simple, unskilled light work that allows for frequent postural changes. [Tr. 16]. With those limitations, Mr. Templeton could perform work that exists in significant numbers in the national economy. [Tr. 17].

This court must affirm an ALJ's conclusions unless the ALJ applied incorrect legal standards or made findings of fact unsupported by substantial evidence in the record. 42 U.S.C. § 405g. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). "The findings of the Commissioner are not subject to reversal merely because there exists in the record substantial evidence to support a different conclusion." *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Accordingly, this court may not try the case *de novo,* nor resolve conflicts in the evidence, nor decide questions of credibility. *Walters v. Commissioner of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997).

Mr. Templeton requests summary judgment and challenges the ALJ's finding that he could perform light work. The ALJ determined Mr. Templeton retained the RFC to perform simple, unskilled light work that allows for frequent postural changes. [Tr. 16]. Light work involves lifting no more than 20 pounds at a time with the frequent lifting of up to 10 pounds. It also involves a considerable amount of standing and walking. 20 C.F.R. § 404.1567(a). Mr. Jeff Snodgrass of Wellmont Rehabilitation Services assessed Mr. Templeton in December 2003. [Tr. 119-43]. He found Mr. Templeton could lift up to 10 pounds occasionally and carry, push, and pull up to 20 pounds occasionally. [Tr. 142]. Dr. John Raff, one of Mr. Templeton's treating

physicians, indicated in January 2004 that he could lift no more than 20 pounds occasionally, 10 pounds frequently, and five pounds continuously. [Tr. 111]. Dr. Raff based this opinion on the results of examinations obtained by Mr. Snodgrass. There is no evidence in the medical record from an *examining* health care provider that Mr. Templeton could not perform light work, and there is evidence from two examining health care providers that he could perform light work. As such, the ALJ's determination that Mr. Templeton could perform simple, unskilled light work that allows for frequent postural changes was made with substantial evidence.

Mr. Templeton also contends the ALJ erred by ignoring the testimony of the vocational expert. During the administrative hearing, vocational expert Cathy Sanders testified that Mr. Templeton would be unable to work if his pain frequently interfered with his ability to concentrate and persist at work tasks. [Tr. 194]. The ALJ, however, found that Mr. Templeton's allegations of disabling pain were not entirely credible. [Tr. 17]. Essentially, then, because the ALJ discounted any notion that Mr. Templeton's pain was so severe that he would be unable to concentrate and perform, he necessarily discounted the vocational expert's testimony. The ALJ's decision was not in error, and this court will note that it is not within its purview to revisit issues of credibility. *Walters*, 127 F.3d at 528.

Finally, Mr. Templeton asks this court for a remand pursuant to the sixth sentence of 42 U.S.C. § 405(g) for new evidence. The alleged new evidence is a May 2005 statement from Dr. Raff. [Tr. 174]. In the statement, the doctor indicated Mr. Templeton could occasionally lift 10 pounds and frequently lift five pounds. [*Id.*]. Dr. Raff also indicated that Mr. Templeton would have to "be free to alternate between sitting or standing positions at will as dictated by

symptoms of back pain and leg numbness" and could only work for four hours a day. [*Id.*]. Dr. Raff wrote that he had been out of the country on military duty from May 11, 2004, until May 2, 2005. [*Id.*].

This court can remand the case to the Commissioner upon a showing by Mr. Templeton that this new evidence is material to his case and that there was good cause for his failure to include this evidence earlier. 42 U.S.C. § 405 (g). Evidence is new only when it was not in existence *and* not available prior to an ALJ's decision. *Sullivan v. Finkelstein*, 496 U.S. 617, 626 (1990). Evidence is material if there is a reasonable probability the ALJ would have reached a different decision had the additional evidence been presented. *Foster v. Halter*, 279 F.3d 348, 357 (6th Cir. 2001).

This court finds the evidence is not material because Dr. Raff failed to explain why his opinion of Mr. Templeton's abilities changed from January 2004[1] to May 2005, especially since the doctor was admittedly out of the country and not treating Mr. Templeton for the majority of that time. Without an explanation for the change, it is unlikely the ALJ would have reached a different conclusion. In addition, the evidence in not new, insofar as Dr. Raff could have filled out a similar statement prior to his leaving for military duty. And, Mr. Templeton has not provided sufficient explanation for why Dr. Raff did not complete such a form earlier.

Because the evidence from Dr. Raff was not material and good cause was not provided for the failure to include this

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[1] In January 2004, Dr. Raff indicated Mr. Templeton could lift no more than 20 pounds occasionally, 10 pounds frequently, and five pounds continuously. [Tr. 111].

evidence earlier, Mr. Templeton's request for a remand pursuant to sentence six of 42 U.S.C. § 405 (g) is denied.

After careful consideration of the entire record of proceedings related to this case, Mr. Templeton's motion for summary judgment will be denied, the defendant's motion for summary judgment [Doc. 14] will be granted, and this action will be dismissed.

An appropriate order will follow.

ENTER:

/s/Thomas Gray Hull
THOMAS GRAY HULL
SENIOR U. S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

No. 2:05-CV-195

[Filed March 9, 2006]

TIMOTHY CRAIG TEMPLETON)
)
v.)
)
JO ANNE B. BARNHARDT,)
Commissioner of Social Security)

JUDGMENT

This is an action for judicial review of the final decision of the defendant Commissioner denying the plaintiff's application for disability insurance benefits under the Social Security Act.

Pursuant to a memorandum opinion filed herewith, the plaintiff's motion for a judgment on the pleadings is **DENIED**; the defendant's motion for summary judgment is **GRANTED**; and this action is **DISMISSED**.

ENTER:

/s/Thomas Gray Hull
THOMAS GRAY HULL
SENIOR U. S. DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

No. 2:05-CV-195

[Filed April 4, 2006]

TIMOTHY CRAIG TEMPLETON)
)
v.)
)
JO ANNE B. BARNHARDT,)
Commissioner of Social Security)

ORDER

The plaintiff Timothy Craig Templeton has filed a motion to alter or amend this court's findings and conclusion from its March 9, 2006, memorandum opinion and judgment. The defendant Jo Anne B. Barnhardt has filed a response. For the reasons indicated below, Mr. Templeton's motion is denied.

Mr. Templeton contends this court erred in failing to find that he was limited to less than light work. He claims his inability to stand for long periods of time removes him from being able to perform light work. The Administrative Law Judge [ALJ] took into consideration Mr. Templeton's inability

to stand in one place for considerable time by limiting him to light work with frequent postural changes. This court affirmed that portion of the ALJ's decision in its March 9, 2006, opinion and has not now been presented with any information which would indicate that decision was in error.

Mr. Templeton next claims this court erred by predetermining that the evidence from Dr. Raff would not have changed the ALJ's decision. This is not what this court found. Instead, this court found "Without an explanation for the change [in Dr. Raff's opinion], it is *unlikely* the ALJ would have reached a different conclusion." [Emphasis added]. Pursuant to sentence six of 42 USC § 405 (g), this court had to determine if the evidence Mr. Templeton wanted considered on remand was material, *inter alia*. And, evidence is material if there is a reasonable probability the ALJ would have reached a different decision had the additional evidence been presented. *Foster v. Halter*, 279 F.3d 348, 357 (6th Cir. 2001). The court considered the probability the ALJ would have reached a different decision to be unlikely and ruled as such. Mr. Templeton's claim that this court predetermined anything is specious.

Lastly, Mr. Templeton claims this court erred by finding he should have submitted the opinions of Dr. Raff to the ALJ before the matter was even set for a hearing. Pursuant to sentence six of 42 USC § 405 (g), this court had to determine if there was good cause for Mr. Templeton's failure to include earlier the evidence he wanted considered on remand, *inter alia*. Pursuant to *Sullivan v. Finkelstein*, 496 U.S. 617, 626 (1990), evidence is new only when it was not in existence *and* not available prior to an ALJ's decision. In Mr. Templeton's case, the evidence might not have been in existence yet (i.e., the form was not yet completed), but it was available. Dr. Raff used information from his treatment

of Mr. Templeton prior to the ALJ's decision to make his recommendations.

After careful consideration of the evidence related to Mr. Templeton's motion to alter or amend, his motion is **DENIED**.

ENTER:

/s/Thomas Gray Hull
THOMAS GRAY HULL
SENIOR U. S. DISTRICT JUDGE

APPENDIX E

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June 4, 2005

Appeals Council
Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, Virginia 22041-3255

RE: TIMOTHY C. TEMPLETON
SSN [REDACTED]-9506

Dear Sirs:

I am writing to appeal Judge Michael J. Davenport's decision in this matter dated April 11, 2005: The evidence in this case supports a finding of disabled.

The ALJ erred by failing to give the claimant's treating physician's, Dr. Raff's, opinion controlling weight pursuant to 20 CFR 416.927(d)(2), and by failing to find the claimant's assertions credible when they were supported by Dr. Raff.

Further, Dr. Raff had been out of the country on active military duty from May 11, 2004 through May 2, 2005, and was unable to render his opinion for this claim as to the extent of Mr. Templeton's disability. The ALJ was mistaken about the level of work Dr. Raff believed the claimant could perform. I am enclosing a *Medical Statement Regarding Physical Abilities and Limitations* that Dr. Raff has been able to prepare since returning from active duty in Afghanistan.

The ALJ also failed to consider the claimant's testimony about his emotional problems even though he is medicated and treated for same.

The claimant asks the Appeals Council to reverse the ALJ's decision and find that he is entitled to disability benefits.

With kindest personal regards, I remain

Yours very truly,

/s/
Douglas T. Jenkins
DTJ/cp

EXHIBIT
AC-2

MEDICAL STATEMENT REGARDING PHYSICAL AND MENTAL ABILITIES AND LIMITATIONS FOR SOCIAL SECURITY DISABILITY CLAIM

[Fold out exhibit see next page]